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UNITED STATES SPRUCE LUMBER CO. *v.* SHUMATE.

Jan. 13, 1916.

[87 S. E. 723.]

**1. Railroads (§ 328\*)—Crossing Accidents—Duty to Look and Listen.**—It is the duty of a traveler crossing a railroad track to look and listen in an effectual manner, and, where he stopped, looked, and listened from a point whence his view was obstructed and he could not see a train, he is guilty of contributory negligence barring recovery, where he immediately drove on the track, although there was a small space beyond the obstruction whence he might have looked and seen the train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1057-1070; Dec. Dig. § 328.\* 11 Va.-W. Va. Enc. Dig. 592.]

**2. Railroads (§ 312\*)—Crossing Accidents—Negligence.**—Where the view at a crossing was so obstructed by lumber piles that plaintiff, who stopped his horse and looked and listened, could not see a train, he cannot recover on the ground that the railroad company negligently failed to keep a lookout for travelers, as such lookout would have been unavailing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 988-1001, 1003-1005; Dec. Dig. § 312.\* 11 Va.-W. Va. Enc. Dig. 591.]

**3. Railroads (§ 337\*)—Crossing Accidents—Negligence.**—That a railroad company was negligent in the operation of its train furnishes no basis for recovery, where such negligence did not cause plaintiff's injury; hence negligence in checking the speed of the train after discovering plaintiff's peril is no basis for recovery, where it would not have prevented the injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1090-1095; Dec. Dig. § 337.\* 11 Va.-W. Va. Enc. Dig. 586.]

**4. Railroads (§ 338\*)—Crossing Accidents—Last Clear Chance Doctrine.**—Where there was no appreciable interval between plaintiff's contributory negligence in driving on a railroad track without effectually attempting to look or listen and the accident, no recovery can be had against the railroad company on the last clear chance doctrine; for that contemplates an appreciable interval between plaintiff's negligence and defendant's opportunity to avoid the injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1096-1099; Dec. Dig. § 338.\* 11 Va.-W. Va. Enc. Dig. 586.]

**5. Appeal and Error (§§ 916, 1175\*)—Determination—Entry of Final Judgment.**—Where plaintiff was twice permitted to amend his declaration, it will be presumed that he made as effective a statement of his cause of action as the facts warranted, and, where his

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

declaration was clearly defective, and demurrers should have been sustained, final judgment will be rendered for defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3699-3705, 4573-4587; Dec. Dig. §§ 916, 1175.\* 1 Va.-W. Va. Enc. Dig. 650.]

Error to Circuit Court, Grayson County.

Action by Carl Shumate, by his next friend, against the United States Spruce Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed.

*R. L. Kirby* and *J. M. Parsons*, both of Independence, and *B. F. Buchanan*, of Marion, for plaintiff in error.

*W. S. Poage*, of Wytheville, and *J. D. Perkins*, of Marion, for defendant in error.

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McCLANAHAN'S ADM'R et al. v. NORFOLK & W. RY. CO et al.

Jan. 13, 1916. Rehearing Denied Feb. 2, 1916.

[87 S. E. 731.]

**1. Creditors' Suit (§ 41\*)—Practice.**—Where some of the judgment creditors of a deceased filed a bill to subject his lands to the lien of their judgment, it is the practice to search out the real property upon which their judgments constitute liens, and bring it before the court for administration, it not being necessary where the rights of third parties do not intervene to amend the pleadings, but where they do intervene an amended bill or a petition should be filed.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 171-174; Dec. Dig. § 41.\* 3 Va.-W. Va. Enc. Dig. 804.]

**2. Creditors' Suit (§ 1\*)—Creditors' Bill—What Constitutes.**—As the substance of a pleading, and not its form, will determine its nature, a bill filed by some of the creditors of a decedent to enforce the lien of judgments upon any land of which the decedent was seised at any time after rendition of the judgments, which declared that it was for the benefit of any other creditors who desired to intervene, is, although only part of the judgments against decedent were set out in the bill and only part of the land owned by the decedent specified, a creditors' bill, this being true, notwithstanding that the bill did not ask that the administrator of the decedent be required to state an account of his administration of the assets of the decedent, there being nothing in the record to show that any personalty came into the hands of the administrator.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\* 3 Va.-W. Va. Enc. Dig. 783.]

**3. Creditors' Suit (§ 1\*)—Creditors' Bill—Petition.**—In such case,

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.